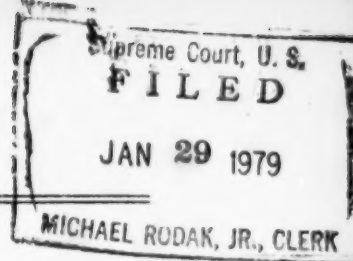


78-1182



IN THE

Supreme Court of the United States

Term,

No.

BARBARA KLINE,

Petitioner,

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH D. TALARICO
MANIFESTO, DOHERTY,
LOVE & TALARICO
Attorneys for Petitioner
200 Lawyers Building
Pittsburgh, Pennsylvania 15219

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IN THE

Supreme Court of the United States

.....Term,

No.

BARBARA KLINE,

Petitioner,

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

The petitioner, Barbara Kline, respectfully prays that a Writ of Certiorari issue to review the judgement order of the United States Court of Appeals for the Third Circuit entered on November 20, 1978.

Opinions Below

The opinion of the National Railroad Adjustment Board which petitioner sought to have reviewed is attached hereto as Appendix "A"; the opinion of the United States District Court for the Western District of Pennsylvania remanding the case

to the National Railroad Adjustment Board for an interpretation is attached hereto as Appendix "B"; the interpretation of the National Railroad Adjustment Board denying petitioner lost wages is attached hereto as Appendix "C"; the opinion of the District Court denying review of the Board's award is unreported and is attached hereto as Appendix "D".

Jurisdiction

The judgment order of the United States Court of Appeals for the Third Circuit is attached hereto as Appendix "E" and was entered on November 20, 1978. This petition is filed within ninety (90) days of that date pursuant to Title 28 United States Code Section 2101 (c).

The Court's jurisdiction is invoked under Title 28 United States Code Section 1254 (1).

Question Presented

Is there nothing that the National Railroad Adjustment Board can do which is reviewable?

Statute Involved

45 U.S.C. § 153 (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith

transmitted by the clerk of court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act (45 USCS §§ 151 *et seq.*) for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code (28 USCS §§ 1254, 1291).

Statement of the Case

Petitioner is seeking lost wages arising from her improper dismissal by defendant and her reinstatement to service pursuant to an order of the National Railroad Adjustment Board Third Division, (hereinafter N.R.A.B.) entered July 16, 1976, (Appendix "A").

Petitioner is a member of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (B.R.A.C.) which had negotiated a collective bargaining agreement with Pittsburgh & Lake Erie Railroad Company, which was in effect at all relevant times in this lawsuit.

Petitioner was granted a thirty (30) day leave of absence from her job as clerk on March 21, 1972, because of injuries

sustained on March 13, 1972, in an off-duty automobile accident. This leave of absence was extended by defendant on three occasions for an additional six (6) months each time, the last leave to expire on October 16, 1973. Each extension was supported by a Doctor's statement indicating that her medical condition continued. The original leave of absence and the extension were given under Rule 23 - "Leave of Absence-" of the clerk's Collective Bargaining Agreement Rule 23 reads as follows:

"An employe may have thirty (30) days' layoff upon receipt of permission from proper officials without written leave of absence. If for over thirty (30) days or under ninety (90) days, he shall have written leave of absence.

The limit of leave of absence to be one year, after which, if an employe returns to the service, he shall be employed as a new man except in cases of sickness, disability, or while engaged on committee work or special duty for the company.

Copy of letter granting leave of absence of over thirty (30) days shall be furnished the Local Chairman.

The above shall not be considered as affecting the rules of the Pension Department.

Note: It is understood that the applications of Rule 23 will not permit the granting of a leave of absence to engage in business or to accept employment in outside service, except that where service conditions permit, employes who have an opportunity to secure employment with Government Agencies handling railroad matters only or with organizations maintained jointly by railroads will be allowed up to six (6) months leave of absence. Requests for extension of leaves of such cases will not be granted unless mutually agreed by the Management and the General Chairman.

Leave of absence will also be granted employees for federal or state military service required by law. Leave

of absence will also be granted employees filling elective political offices. An employe, who fails to report for duty at the expiration of leave of absence shall be considered out of service except that when failure to report on time is the result of unavoidable delay, the leave will be extended to include such delay."

Subsequent to the granting of the leave of absence petitioner accepted employment as a waitress in the Global Lounge in Washington, Pennsylvania. While her leave of absence was still in effect, the defendant terminated the petitioner's employment because they contended she had violated Rule 23 of the collective bargaining agreement engaging in employment at the Global Lounge.

The petitioner appealed this dismissal through various steps of the grievance procedure contained in the collective bargaining agreement with the company's contention being upheld at each stage. However, in arbitration procedures before the Third Division of the N.R.A.B. a decision in favor of petitioner was rendered on July 16, 1976 (Appendix "A"). The N.R.A.B. found that Rule 23 prohibited the granting of a leave of absence to engage in outside employment, but did not prohibit employment after a valid leave of absence had been granted.

At issue in this lawsuit is whether the petitioner is entitled to back wages from August 30, 1973, to September 16, 1976, the period during which petitioner's job was improperly terminated. The N.R.A.B.'s order accompanying the opinion of July 16, 1976 (Appendix "A") was ambiguous as to whether petitioner was entitled to back wages. The defendant refused to pay the petitioner these back wages because the N.R.A.B.'s opinion did not specifically state that they must be paid.

On March 29, 1977, petitioner filed a complaint in the United States District Court seeking lost wages for the period

during which petitioner's employment was improperly terminated. The basis for federal jurisdiction was the National Railway Labor Act 45 U.S.C.—§§ (p) (q). On July 8, 1977, the District Court entered an order remanding the case to the Third Division of the N.R.A.B. to obtain a clarification of its initial award. On November 18, 1977, the N.R.A.B. rendered its interpretation, stating that petitioner was not entitled to back wages under the award (Appendix "C"). On February 14, 1978, the District Court issued an order granting defendant's summary judgement (Appendix "D").

Petitioner filed a notice of appeal on April 14, 1978. The court of Appeals entered a judgement order affirming the judgement of the District Court on November 20, 1978 (Appendix "E").

Reasons for Granting Writ

The petitioner believes that the courts below have radically and improperly extended the authority granted the National Railroad Adjustment Board under the National Railway Labor Act. In failing to review the N.R.A.B.'s findings the courts have set new standards for arbitrators.

The N.R.A.B. was established to interpret or apply agreements between employees and a carrier. As stated in Title 45 United States Code Section 151 (a).

General purposes—The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the

prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) *to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working condition.*

Petitioner's contention is that the board's denial of lost wages was a failure of the board to confine itself to matters within the scope of the division's jurisdiction.

Rule 20 of the collection bargaining agreement states:

"(a) No employe shall be disciplined or dismissed without a hearing, but may be held out of service pending such hearing, which shall be prompt. At a reasonable time prior to the hearing, he shall be apprised of the charge against him and given opportunity to secure the presence of necessary witnesses.

(b) A decision will be rendered within ten (10) days after completion of hearing. If an appeal is taken, it must be filed with the next higher official and a copy furnished the official whose decision is appealed within ten (10) days after date of decision. The hearing and decision on the appeal shall be governed by the time limit of this section.

(c) At the hearing or on the appeal, if the employe desires assistance, such employe shall be assisted by one or more accredited representatives.

(d) Appeal may be made by employes or representatives in regular order of succession and in the manner prescribed, up to and including the highest official designated by the company.

(e) *If the employe is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, if any, and his record cleared.*

(f) An employe on request will be given a letter stating the cause of discipline.

(g) Committees of employees shall be granted leave of absence and free transportation for the adjustment of differences between the company and the employees.

(h) When employees are subject to discipline, the same shall be made effective within thirty (30) days from date irregularity was known by proper official. If an employee is suspended, the suspension shall date from the time he was taken out of the service. Indefinite suspension shall not be applied as discipline.

Note: It is understood the above does not apply to employees who have not been in the service more than sixty (60) days.

The N.R.A.B. rendered a decision declaring the petitioner was not guilty of any violation, and that the collective bargaining agreement was violated by the defendant. In light of the collective bargaining agreement mandating compensation for net wage lost (20 (e) above), the N.R.A.B.'s decision is wholly baseless. There was no discretion in granting lost wages upon reinstatement after an improper dismissal. There is but one possible interpretation and application of Rule 20 (e); upon a finding of not guilty, claimant is entitled to compensation for net wages loss.

By denying review of the N.R.A.B.'s decision the District Court and Circuit Court have tremendously enhanced the authority granted the N.R.A.B. under the Railway Labor Act and disregarded the standards set for arbitrators under the Act and under *U.S. Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593, 80 s.ct. 1358, 4 L.Ed 2d 1424 (1960) and *Gunther v. San Diego and Arizona Eastern Railway Company*, 382 U.S. 257, 75 L.Ed. 2d 398, 86 s.ct. 368 (1965). Under those authorities an arbitrator is confined to an interpretation and application of collective bargaining agreement. In the case at issue here, the National Railroad Adjustment Board has rewritten the collective bargaining agreement, with the stamp of approval of the courts.

Conclusion

If the courts will not review an award of the National Railroad Adjustment Board which ignores an express provision of a collective bargaining agreement then the National Railroad Adjustment Board is free to act as it sees fit without regard to judicial and legislative standards, and in contempt of collective bargaining agreements.

It is respectfully requested that this Court grant a Writ of Certiorari and reverse the decision of the Court of Appeals.

Dated:

JOSEPH D. TALARICO,
MANIFESTO, DOHERTY, LOVE
& TALARICO,
Attorneys for Petitioner.

**Appendix "A"—Opinion and Order of the
National Adjustment Board**

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph A. Sickles, Referee

Award Number 21128

Docket Number CL-21275

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees

Pittsburgh and Lake Erie Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (CL-7868) that:

(a) The Carrier violated the Rules Agreement, effective September 10, 1946, particularly Rule 20, when it assessed discipline of dismissal on Claimant, Barbara Kline, a Clerk on leave of absence from the Carrier's Accounting Department at Pittsburgh, Pennsylvania.

(b) Claimant Barbara Kline's record be cleared of the charges brought against her on August 20, 1973.

(c) Claimant Barbara Kline be restored to service with seniority and all other rights unimpaired.

OPINION OF BOARD:

Claimant was found guilty of violating Rule 23 because she allegedly engaged in business while on leave of absence:

*Appendix "A"—Opinion and Order of the
National Adjustment Board.*

"RULE 23 — LEAVE OF ABSENCE

An employe may have thirty (30) days' layoff upon receipt of permission from proper officials without written leave of absence. If for over thirty (30) days or under ninety (90) days, he shall have written leave of absence. The limit of leave of absence to be one year, after which, if an employe returns to the service, he shall be employed as a new man except in cases of sickness, disability, or while engaged on committee work or special duty for the company.

NOTE: It is understood that the application of Rule 23 will not permit the granting of a leave of absence to engage in business or to accept employment in outside service."

The record shown that Claimant had received a leave of absence due to a physical disability, which was subsequently extended. The last extension granted was due to expire in October, 1973, but the Carrier's actions, discussed herein, terminated it on August 20, 1973.

The Organization maintains that the "Note" to Rule 23 does not apply to the instant case, because the alleged activities in question occurred after the leave of absence was properly obtained and extended, whereas the pertinent language prohibits the ". . . granting of a leave of absence to engage in business . . ." (underscoring supplied).

Although it is undisputed that Claimant was the President-Treasurer of the Global Lounge, Inc., during the time in question, and that she was observed serving patrons, the Employees deny that this activity violated Rule 23 as it neither

*Appendix "A"—Opinion and Order of the
National Adjustment Board.*

constituted employment or involved the physical stress of her clerical position.

Carrier contends that Claimant clearly "engaged in business outside of service" while on leave of absence, as shown by her ownership of the business and the observation of her serving in the bar. It states, further, that Claimant's failure to report for a service examination confirms her intention to violate Rule 23. Carrier states, in its submission, that if Claimant had complied with the instruction to report to Chief Surgeon Happel's office to determine whether or not she was capable of performing clerical services and had been found incapable of working, her leave of absence would not have been terminated.

At first blush, there is a tendency to presume that the Note to Rule 23 serves as a contractual deterrent to activities of a business nature while an employee is on a leave of absence. But, the rule is not so worded. It refers to a "granting" of leave. The admonition contained in Award 12558 is particularly pertinent here:

"We may not inject our predilections as to what is fair, just and equitable. Nor can we engage in speculation as to what might have been in the minds of the parties, but not evidenced in the Agreement as executed, or otherwise proven."

We do not mean to suggest that the Carrier is without recourse if it charged, and proved, a fraud in the obtaining of a leave or an extension thereof; but such is not the allegation here. Moreover, the Carrier is not precluded from a consideration of its knowledge of outside activities concerning a request for an extension. Under those types of circumstances,

*Appendix "A"—Opinion and Order of the
National Adjustment Board.*

questions of whether ownership of a business is embraced within the term "engage in business"—questions of proof, etc.—may be quite material to a resolution. But we do not find that those issues are material here. In short, we feel that, under the precise wording of the rule, the Carrier's attempt to terminate the leave in August, 1973 was premature.

Reliance upon an Award of Public Law Board No. 1376 is misplaced. That dispute concerned significantly different factual circumstances.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the Parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. PAULIS
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

*Appendix "A"—Opinion and Order of the
National Adjustment Board.*

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
ORDER**

To accompany Award Number 21128
Docket Number CL-21275

TO: Mr. Paul Mansfield, Director
Labor Relations & Personnel
Pittsburgh and Lake Erie Railroad Company
P&LE Terminal Building
Pittsburgh, Pennsylvania 15219

The Pittsburgh and Lake Erie Railroad Company is hereby ordered to make effective Award Number 21128, made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the Award on or before X X X X X.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. PAULIS
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

**Appendix "B"—Memorandum Opinion and Order
of the United States District Court
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BABARA KLINE,

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348.

Dated: July 8, 1977

MEMORANDUM OPINION

The plaintiff in this case, Barbara Kline, worked as a clerk for the defendant Pittsburgh & Lake Erie Railroad Company (P&LE) from May 16, 1969 until March 21, 1972, when she was given a leave of absence because of injuries sustained in an automobile accident. The plaintiff was a member of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (B.R.A.C.) which had negotiated a collective bargaining agreement with the P&LE which was in effect at all relevant times in this lawsuit.

While her leave of absence was still in effect, the P&LE terminated the plaintiff's employment because she allegedly had violated Rule 23 of the collective bargaining agreement:

"It is understood that the application of Rule 23 will not permit the granting of a leave of absence to engage in business or to accept employment in outside service."

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

The plaintiff's alleged violation of this rule involved her acceptance of employment as a waitress in the Global Lounge in Washington, Pennsylvania.

The plaintiff appealed this dismissal through the various steps of the grievance procedure contained in the collective bargaining agreement with the company's position being upheld at each step. However, arbitration procedures before the Third Division of the National Railroad Adjustment Board (NRAB) resulted in a decision in the plaintiff's favor on July 16, 1976, Award No. 21128, Docket No. CL-21275. The NRAB ruled that rule 23 prohibited only the *granting* of leaves of absence to engage in outside employment but did not necessarily prohibit acquiring employment *after* a leave had been granted.

At issue in this lawsuit is whether the plaintiff is entitled to back wages from August 30, 1973 until September 16, 1976, when she returned to work. The defendant has refused to pay the plaintiff these back wages because the NRAB's opinion does not specifically state that they must be paid. The plaintiff on the other hand, claims that an intention to award back wages can convincingly be inferred from the NRAB's opinion. In support of this position the plaintiff points to the NRAB's ruling that the plaintiff be reinstated with "seniority and all other rights unimpaired" and to Rule 20, pursuant to which this dispute reached the NRAB, which authorizes awards of back pay.¹

This court cannot determine with certainty which interpretation of the NRAB's July 16, 1976 opinion is correct. The

¹ Rule 20(c). If the employee is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, if any, and his record cleared.

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

court also notes that the NRAB's order accompanying the opinion is also ambiguous, stating that:

"The Pittsburgh and Lake Erie Railroad Company is hereby ordered to make effective Award Number 21128, made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the award on or before x x x x."

The purpose of crossing out the date if not clear.

This member of the court was faced with an ambiguous order of the United Railroad Workers Division of Transport Workers Union, AFL-CIO System Board of Adjustment (System Board) in the case of Frank A. Sciotto, et al v. George P. Baker, et al, CA 72-1124. Appeal to the Federal Court from System Board Rulings, as well as from NRAB rulings, lies under 45 USC 153 p and q.²

² "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board in the Premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the

(Footnote continued on following page)

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

In the Sciotto case, the System Board had ruled that the plaintiff was entitled to back wages if found to be fit to work during the period of his illegal layoff. The ambiguity arose from the fact that a medical report about Sciotto was wholly

(Footnote continued from preceding page)

district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, that such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction or for fraud or corruption by a member of the division making the order.

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject as provided in sections 1291 and 1254 of Title 28, United States Code."

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

inconclusive as to the ability of Sciotto to perform his duties between March 18, 1969 and March 3, 1972, the date of the medical examination and the System Board award simply does not specify what should happen where the physicians' report does not refer to Sciotto's fitness prior to the time of the examination.

This court felt that it was limited under 45 USC 153 to enforcing or setting aside the order of the System Board and accordingly interpreted the award in what appeared to be the most reasonable manner. (Memorandum and Order denying the defendant's motion for judgment on the pleadings, November 13, 1973, Unpublished). The Third Circuit reversed this court finding that the proper course of action under these circumstances was to remand the case to the System Board to seek clarification of their award:

"In light of the record, we are constrained to conclude that the intended disposition by the System Board in this matter was sufficiently unclear so that the district court award of back wages for the period from March 18, 1969 to March 21, 1972 cannot be sustained.

* * * *

"No enforcement could be ordered by the district court without substantial interpretation regarding the intention of the System Board as to the period in question. Such interpretation is not the function of a federal court under the statute. (Appeal No. 74-1650, 3d cir, unpublished opinion, Per Curiam, March 5, 1975, pp. 4-5).

This case is exactly like Sciotto in that the NRAB ruling is unclear. The court will therefore follow the Third Circuit's

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

mandate in Sciotto and orders this case remanded to the Third Division of the National Railroad Adjustment Board to obtain clarification of its award with regard to whether or not the plaintiff shall receive back wages. This court will retain jurisdiction to enforce or set aside the order under 45 USC 153 after it has been clarified by the NRAB.

s/ WILLIAM W. KNOX,
United States District Judge.

CC: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARBARA KLINE,

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348

ORDER

AND NOW, to wit, July 8, 1977, after consideration of the briefs and arguments of the parties and for the reasons advanced in the accompanying memorandum,

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

IT IS ORDERED that the within case be and the same is hereby remanded to the Third Division of the National Railroad Adjustment Board to obtain clarification of Award Number 21128, Docket Number CL-21275 dated July 16, 1976, with regard to whether the plaintiff is entitled to receive back wages.

IT IS FURTHER ORDERED that the defendant's motion to dismiss be and the same is hereby denied with the court retaining jurisdiction over this case under 45 USC 153 to enforce or set aside the award of the Third Division of the National Railroad Adjustment Board after it has been clarified.

IT IS FURTHER ORDERED that counsel for both parties proceed forthwith to notify the Third Division of the National Railroad Adjustment Board and provide the same with copies of this opinion and order to the end that expeditious treatment may be accorded this matter.

s/ WILLIAM W. KNOX,
United States District Judge.

CC:

Joseph Talarico, Esq.,
200 Lawyers Bldg. 15219.

Edward Yurcon, Esq.,
324 P&LE Terminal 15222.

**Appendix "C"—Interpretation of Board's Opinion
Upon Demand**

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Joseph A. Sickles, Referee

Serial No. 293
Award Number 21128
Docket Number CL-21275

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station employees

Pittsburgh and Lake Erie Railroad Company

**ON REMAND FROM THE
UNITED STATES DISTRICT COURT-
WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 77-348**

INTERPRETATION TO AWARD 21128, DOCKET CL-21275

We are called upon to render an interpretation of Award 21128 of this Division, particularly as to whether or not there is an entitlement to receive back wages under that Award.

Initially, we are inclined to remind the parties that the purpose of an Interpretation is to clarify an Award; but it is not a means to provide an avenue to reargue the original claim.

In the Court's Memorandum Opinion which accompanied the Order of Remand, we find:

"The plaintiff on the other hand, claims that an intention to award back wages can convincingly be inferred from the NRAB's opinion."

***Appendix "C"—Interpretation of Board's
Opinion Upon Demand.***

In that regard the Court noted Rule 20(e):

"If the employee is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, if any, and his record cleared.

Reference to the cited Rule was made in the Employee's original Submission. Carrier did not challenge or rebut that inclusion as being "new argument" or not a matter which had been raised when the matter was under review on the property prior to the original Submission. Significantly, the Board considered - and rejected - the Rule 20(e) argument in view of the circumstances presented in this dispute.

Our "Claim Sustained" Award was merely responsive to the Statement of Claim, and the issuance of a "Blank Order" is a Division practice which does not require a "payment of money."

The employee is not entitled to back wages under Award 21128.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

ATTEST: s/ A. W. Paulis
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November 1977.

**Appendix "D"—Memorandum and Order of the
United States District Court**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARBARA KLINE

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348

Dated: February 14, 1978

MEMORANDUM: DEFENDANT'S MOTION TO DISMISS

This controversy arises from an order of the National Railroad Adjustment Board Third Division entered July 16, 1976, award No. 211128, Docket No. CL21275 sustaining plaintiff's claim for restoration of service with seniority and all other rights unimpaired but which were silent with respect to back pay. The order was as follows:

"The Pittsburgh and Lake Erie Railroad Company is hereby ordered to make effective Award Number 21128, made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the award on or before. . ."

*Appendix "D"—Memorandum and Order of the
United States District Court.*

Plaintiff claiming she was entitled to back pay under Rule 20(c) of the Collective Bargaining Agreement which provides:

"If the employee is found not guilty of the offense with which charged, he shall be reinstated compensated for his net wage loss if any and his record cleared"

brought suit in this court to enforce the award by requiring payment of amount allegedly due for back wages. Plaintiff had already been restored to her job pursuant to the award.

The court finding the award ambiguous remanded the matter to the Third Division of the National Railroad Adjustment Board to obtain clarification as to whether plaintiff was entitled to receive back wages. See order of this court dated July 8, 1977. The Board thereafter issued its interpretation to Award 21128 dated November 18, 1977, in which they said, *inter alia*:

"Rule 20(e) argument in view of the circumstances presented in this dispute.

"Our 'Claim sustained' Award was merely responsive to the Statement of Claim, and the issuance of a 'Blank Order' is a Division practice which does not require a 'payment of money'.

"The employee is not entitled to back wages under Award 21128."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. Paulis

Executive Secretary

Dated at Chicago, Illinois, this 18th Day of November, 1977."

*Appendix "D"—Memorandum and Order of the
United States District Court.*

Defendant therefore came back with a motion to dismiss the action which the court will treat as a motion for summary judgment under Rule 56 in view of the fact materials *de hors* the record have been recieved by the court.

It has been many times emphasized that it is not the business of this court to clarify doubtful or ambiguous awards. Pursuant to procedure followed by the Third Circuit in *Frank A. Sciotto v. George P. Baker, et al*, 72-1124, we held we could not order enforcement without substantial interpretation and remanded for interpretation by the Board. We have now received this interpretation holding that the employee was entitled to reinstatement but not to back wages and that Rule 20(c) relative to payment of back wages had been considered.

In support of its motion, defendant cites *Gunther v. San Diego and Arizona Eastern Railway Co.*, 382 US 257, 15 L Ed 2d, 308, 86 S Ct 368 (1965) wherein it was held that the court had gone beyond its power in rejecting the Board's interpretation of the Collective Labor Contract unless it could be said that the Board's interpretation was wholly baseless and completely without reason. We must remember that the law contemplates that decisions on these matters involving expertise in the railroad industry should be made by the Railroad Board of Adjustment and not by the courts. The Board states in its ruling that it has been Division practice to issue awards in cases sustaining the claim but not requiring the payment of money and we cannot say that the Board is not exercising its peculiar knowledge of the railroad industry in entering such orders.

It being clear that the Board did not intend to award back pay to the plaintiff, we must dismiss the case and enter judgment for the defendant.

s/ WILLIAM W. KNOX
U.S. District Judge.

CC: Counsel of record.

*Appendix "D"—Memorandum and Order of the
United States District Court.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARBARA KLINE

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348

ORDER

AND NOW, to wit, February 14, 1978, for reasons set forth in the accompanying memorandum,

IT IS ORDERED that defendant's motion to dismiss filed December 15, 1977, be and the same hereby is granted.

IT IS FURTHER ORDERED that summary judgment be entered in favor of the defendant and against the plaintiff.

s/ WILLIAM W. KNOX,
U.S. District Judge.

CC:

Joseph Talarico, Esq.
200 Lawyers Bldg 15219

Edward Yurcon, Esq.
324 P&LE Terminal Bldg 15222

**Appendix "E"—Judgment Order of the Court
of Appeals of November 20, 1978**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1470

BARBARA KLINE,

Appellant,

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.

Appeal From The United States District Court
For The Western District of Pennsylvania

D.C. Civil No. 77-348

Submitted Under Rule 12(6) November 14, 1978
Before ROSENN, GARTH, and HIGGINBOTHAM,
Circuit Judges.

*Appendix "E"—Judgment Order of the Court of
Appeals of November 20, 1978.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant,
it is

ADJUDGED and ORDERED that the judgment of the
district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

s/ MAX ROSENN
Circuit Judge

Attest:

THOMAS F. QUINN, Clerk

Dated: NOV 20 1978

FEB 28 1979

WILLIAM H. BODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____, Term, _____

No. 78-1182

BARBARA KLINE,

Petitioner,

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
*Respondent.*_____
**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**
_____G. EDWARD YURCON
Attorney for Respondent
324 P&LE Terminal Bldg.
Pittsburgh, PA 15219

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IN THE

Supreme Court of the United States

..... Term,

No. 78-1182

BARBARA KLINE,

Petitioner,

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The respondent, The Pittsburgh and Lake Erie Railroad Company, respectfully prays that petitioner's Writ of Certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit be denied.

Opinions Below

The Opinion and Order of the National Railroad Adjustment Board (NRAB) which petitioner sought to have review-

ed in the Courts below is attached hereto as Appendix "A"; the opinion of the United States District Court for the Western District of Pennsylvania remanding the said Order to the NRAB for interpretation is attached hereto as Exhibit "B"; the interpretation of the NRAB stating petitioner was not entitled to back wages under its original award and order is attached hereto as Appendix "C"; the opinion of the District Court granting respondent's Motion to Dismiss and entering summary judgment for respondent is attached hereto as Appendix "D", and the Judgment Order of the Court of Appeals affirming the judgment of the District Court is attached hereto as Appendix "E".

Jurisdiction

The Court has jurisdiction under Title 28 United States Code, Section 1254(1).

Question Presented

Can a Court review the merits of an Award and Order of the National Railroad Adjustment Board concerning a matter of contract interpretation which was properly brought before the National Railroad Adjustment Board?

Statute Involved

45 U.S.C. § 153(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the

division's order. A copy of the petition shall be forthwith transmitted by the clerk of court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act (45 USCS §§ 151 *et seq.*) for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code (28 USCS §§ 1254, 1291).

Statement of the Case

a. Nature of the Case

Petitioner, a clerical employee of respondent, seeks back wages pursuant to the National Railway Labor Act, 45 U.S.C., Section 153, on a complaint arising from her dismissal by respondent and subsequent reinstatement to service by an Award and Order of the National Railroad Adjustment Board, Third Division (NRAB) entered on July 16, 1976 (Appendix "A"). The NRAB found that the respondent violated the Rules Agreement between it and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express, and Station Employees (BRAC) when it assessed the discipline of dismissal against petitioner for an alleged violation of Rule 23—Leave of Absence. The NRAB, by its

Award and Order, directed that petitioner's record be cleared of the charges and that she be "restored to service with seniority and all other rights unimpaired." (Appendix "A")

On March 29, 1977, petitioner filed a Complaint in the United States District Court for the Western District of Pennsylvania asserting jurisdiction under the National Railway Labor Act, 45 U.S.C. § 153 First (p) and (q), and sought by her Complaint to enforce the aforesaid Award and Order, contending that the payment of back wages was thereby directed. In response to the Complaint, respondent filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b) on the grounds that, *inter alia*, the Complaint should be dismissed for lack of jurisdiction over the subject matter and for failure to submit a claim on which relief can be granted. After hearing, the Court rendered its Memorandum Opinion and Order remanding the case to the NRAB to obtain clarification of the Award of July 16, 1976, with regard to whether the petitioner is entitled to receive back wages (Appendix "B"). Contemporaneously, the Court denied respondent's Motion to Dismiss and retained jurisdiction over the case under 45 U.S.C. Section 153 to enforce or set aside the award after it had been clarified.

On November 18, 1977, the NRAB, on remand, rendered its interpretation of the July 16, 1976, Award and Order. The NRAB stated in its interpretation that "the 'blank order' is a Division practice which does not require a 'payment of money'" and it further stated "the employee is not entitled to back wages." (Appendix "C")

On December 13, 1977, respondent again filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b) for lack of jurisdiction over subject matter and for failure to state a claim upon which relief can be granted. After hearing, the

Court granted the motion and ordered that summary judgment be entered in favor of the respondent and against petitioner (Appendix "D").

Petitioner thereupon appealed the judgment of the District Court to the United States Court of Appeals for the Third Circuit, upon the sole ground that the award and order of the NRAB should be set aside for *failure to conform* to matters within the scope of its jurisdiction. On November 20, 1978, the Circuit Court affirmed the judgment order of the District Court (Appendix "E").

b. Statement of Relevant Facts

On March 21, 1972, petitioner was granted an oral leave of absence for thirty (30) days from her railroad employment because of injuries sustained on March 13, 1972, in an off-duty automobile accident. This leave of absence was extended in writing for a period of six (6) months on April 14, 1972, based upon a statement by her doctor that "Mrs. Barbara E. Kline is my patient currently under my care with Spondylolysis. She will be unable to return to work for an indefinite period of time." Thereafter, on October 4, 1972, and April 5, 1973, two additional written six month leaves of absences were granted, the last leave to expire October 16, 1973. Each extension was supported by petitioner's doctor's statement indicating that her medical condition continued and she would be out of work indefinitely. During July of 1973, the respondent learned that petitioner was working at a bar known as the Global Lounge. Respondent considered this activity to constitute a violation of Rule 23—Leave of Absence of its Agreement with petitioner's representative labor union, BRAC. On July 31, 1973, respondent notified petitioner, in writing, of its knowledge of her work at the Global Lounge, and stated that her leave of absence would be terminated as of

August 20, 1973. She was also instructed to report to respondent's Chief Surgeon on August 13, 1973, for a return-to-service physical examination. Petitioner failed to report for the scheduled examination and she did not otherwise answer respondent's notice concerning her return to service. Petitioner was thereafter given notice as required by Rule 20 of the applicable labor agreement charging her with violation of Rule 23. After hearing on the charge, she was found guilty of violation of Rule 23 and her service with the Carrier was terminated as of September 20, 1973.

Thereafter, various appeals under the collective bargaining agreement were pursued by BRAC on petitioner's behalf in accordance with the provisions of the Railway Labor Act and the applicable agreement. On July 16, 1976, the NRAB entered its Award and Order reinstating petitioner to service.

On August 2, 1976, respondent advised petitioner, by certified mail, of the entry of said Award and Order and advised her that she was restored to service with seniority and all other rights unimpaired. Petitioner was further advised that prior to return to employment she would be required to have a return-to-service examination. After repeated efforts by respondent, petitioner reported on September 13, 1976, for a return-to-service physical examination. Petitioner successfully passed the physical examination and, following a review of her rights and options for return to duty by respondent and BRAC representatives, she returned to service on September 14, 1976. At the time petitioner returned to service, no claim for back wages was made by petitioner or her representative, BRAC.

Argument for Denying the Writ

The Courts below in denying review of the National Railroad Adjustment Board's Award and Order have adhered to the precedents established in *Gunther v. San Diego & Arizona Eastern Railway Co.*, 86 S. Ct. 368, 382 U.S. 257 (1965) and its progeny which holds that matters involving minor disputes of railroad workers under the Railway Labor Act should be finally decided by adjustment boards.

This Court, in *Gunther, supra*, set forth its mandate that disputes by an employee and a carrier growing out of a grievance, and interpretation, or application of an agreement, are to be handled by the NRAB. The Court said the following at page 261:

"In Section 3 Congress has established an expert body to settle 'minor' grievances like petitioner's which arise from day to day in the railroad industry. The Railroad Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs and practices. See *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 243-244. . . . As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field."

Again, in this regard, the Supreme Court said, at page 263:

"This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of

railroad workers to be decided finally by the Railroad Adjustment Board. In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co. v. Price*, 360 U.S. 601, the Court discussed the legislative history of the Act at length and pointed out that it 'was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board. . . . ' 360 U.S., at 616. Also in *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field,' p. 40, 'the complete and final means for settling minor disputes', p. 39, and 'a mandatory, exclusive, and comprehensive system for resolving grievance disputes.' P. 38."

Respondent submits that petitioner, by contending here that the NRAB did not conform to matters within the scope of its jurisdiction, is really requesting the Court to rule on the merits of the case, that is, that the NRAB's interpretation of the Award as to whether back wages were payable is incorrect.

Petitioner argues that the NRAB had no discretion concerning an entry of an award for back wages and that upon a finding that petitioner was not guilty of violation of Rule 23, the NRAB was mandated to enter an award for back wages.

However, the relevant subsection of Rule 20 upon which petitioner relies, provides in this material regard, as follows:

"(e) If the employe is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, *if any*, and his record cleared." (Emphasis added)

Respondent contends that the foregoing provision does not mandate payment of back wages, but merely provides that the NRAB can consider whether back wages are payable under the attendant circumstances. In this regard, the NRAB, on remand, stated:

"Reference to the cited Rule was made in the Employee's original Submission. Carrier did not challenge or rebut that inclusion as being 'new argument' or not a matter which had been raised when the matter was under review on the property prior to the original Submission. Significantly the Board considered—and rejected—the Rule 20(e) argument in view of the circumstances presented in this dispute.

Our 'Claim Sustained' Award was merely responsive to the Statement of Claim, and the issuance of a 'Blank Order' is a Division practice which does not require a 'payment of money.'

The employee is not entitled to back wages under Award 21128." (Appendix "C")

The record that was before the NRAB clearly supports its decision not to award back wages since it evidences that petitioner was unable to work or was unfit for service beginning March 13, 1972, and continued thereafter for an indefinite period, including the period of time when her outside employment was cited by respondent. The record is silent as to the date when petitioner first became physically qualified to return to her railroad employment.

The Award of the NRAB must be upheld since the record does not show the NRAB acted outside the scope of its jurisdiction. To exceed its jurisdiction, the NRAB would have to enter an award which was "wholly baseless and completely without reason", or was "actually and undisputedly without foundation in reason or fact," so as to be unconnected with the wording and purpose of the bargaining agreement,

manifesting an infidelity to the obligation of the arbitrating body. *Gunther v. San Diego & Arizona Eastern Railway Co.*, 86 S. Ct. 368, 382 U.S. 257 (1965), *Brotherhood of RR Trainmen v. Central of Ga. Rw. Co.*, 415 F.2d 403 (5th Cir. 1969), cert. den. 396 U.S. 1008 (1970), *Kotakis v. Elgin, Joliet & Eastern Railway Co.*, 520 F.2d 570 (7th Cir. 1975).

Conclusion

Petitioner's request for a Writ of Certiorari should be denied because the decisions below gave full consideration to the issue of granting review on the question of a back pay award, and the Courts below have decided it correctly.

Furthermore, the decisions below follow an unbroken line of authority established by this Court holding that Congress in enacting Title 45 U.S.C. Section 153 of the Railway Labor Act intended that such minor disputes of railroad workers should be decided finally by the National Railroad Adjustment Board.

The issue in the present case is primarily an evidentiary matter, is unlikely to recur, and is too narrow to warrant review by this Court on certiorari.

It is respectfully requested that a Writ of Certiorari be denied.

Respectfully submitted,

G. EDWARD YURCON
Attorney for Respondent

Appendix "A"—Opinion and Order of the National Railroad Adjustment Board

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph A. Sickles, Referee

Award Number 21128

Docket Number CL-21275

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees

Pittsburgh and Lake Erie Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (CL-7868) that:

(a) The Carrier violated the Rules Agreement, effective September 10, 1946, particularly Rule 20, when it assessed discipline of dismissal on Claimant, Barbara Kline, a Clerk on leave of absence from the Carrier's Accounting Department at Pittsburgh, Pennsylvania.

(b) Claimant Barbara Kline's record be cleared of the charges brought against her on August 20, 1973.

(c) Claimant Barbara Kline be restored to service with seniority and all other rights unimpaired.

OPINION OF BOARD:

Claimant was found guilty of violating Rule 23 because she allegedly engaged in business while on leave of absence:

*Appendix "A"—Opinion and Order of the
National Railroad Adjustment Board.*

"RULE 23 — LEAVE OF ABSENCE

An employee may have thirty (30) days' layoff upon receipt of permission from proper officials without written leave of absence. If for over thirty (30) days or under ninety (90) days, he shall have written leave of absence. The limit of leave of absence to be one year, after which, if an employee returns to the service, he shall be employed as a new man except in cases of sickness, disability, or while engaged on committee work or special duty for the company.

NOTE: It is understood that the application of Rule 23 will not permit the granting of a leave of absence to engage in business or to accept employment in outside service."

The record shown that Claimant had received a leave of absence due to a physical disability, which was subsequently extended. The last extension granted was due to expire in October, 1973, but the Carrier's actions, discussed herein, terminated it on August 20, 1973.

The Organization maintains that the "Note" to Rule 23 does not apply to the instant case, because the alleged activities in question occurred after the leave of absence was properly obtained and extended, whereas the pertinent language prohibits the ". . . granting of a leave of absence to engage in business . . ." (underscoring supplied).

Although it is undisputed that Claimant was the President-Treasurer of the Global Lounge, Inc., during the time in question, and that she was observed serving patrons, the Employees deny that this activity violated Rule 23 as it neither

*Appendix "A"—Opinion and Order of the
National Railroad Adjustment Board.*

constituted employment or involved the physical stress of her clerical position.

Carrier contends that Claimant clearly "engaged in business outside of service" while on leave of absence, as shown by her ownership of the business and the observation of her serving in the bar. It states, further, that Claimant's failure to report for a service examination confirms her intention to violate Rule 23. Carrier states, in its submission, that if Claimant had complied with the instruction to report to Chief Surgeon Happel's office to determine whether or not she was capable of performing clerical services and had been found incapable of working, her leave of absence would not have been terminated.

At first blush, there is a tendency to presume that the Note to Rule 23 serves as a contractual deterrent to activities of a business nature while an employee is on a leave of absence. But, the rule is not so worded. It refers to a "granting" of leave. The admonition contained in Award 12558 is particularly pertinent here:

"We may not inject our predilections as to what is fair, just and equitable. Nor can we engage in speculation as to what might have been in the minds of the parties, but not evidenced in the Agreement as executed, or otherwise proven."

We do not mean to suggest that the Carrier is without recourse if it charged, and proved, a fraud in the obtaining of a leave or an extension thereof; but such is not the allegation here. Moreover, the Carrier is not precluded from a consideration of its knowledge of outside activities concerning a request for an extension. Under those types of circumstances,

*Appendix "A"—Opinion and Order of the
National Railroad Adjustment Board.*

questions of whether ownership of a business is embraced within the term "engage in business"—questions of proof, etc.—may be quite material to a resolution. But we do not find that those issues are material here. In short, we feel that, under the precise wording of the rule, the Carrier's attempt to terminate the leave in August, 1973 was premature.

Reliance upon an Award of Public Law Board No. 1376 is misplaced. That dispute concerned significantly different factual circumstances.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the Parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. PAULIS
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

*Appendix "A"—Opinion and Order of the
National Railroad Adjustment Board.*

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

ORDER

To accompany Award Number 21128
Docket Number CL-21275

TO: Mr. Paul Mansfield, Director
Labor Relations & Personnel
Pittsburgh and Lake Erie Railroad Company
P&LE Terminal Building
Pittsburgh, Pennsylvania 15219

The Pittsburgh and Lake Erie Railroad Company is hereby ordered to make effective Award Number 21128, made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the Award on or before X X X X X.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. PAULIS
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

**Appendix "B"—Memorandum Opinion and Order
of the United States District Court**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BARBARA KLINE,

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348.

Dated: July 8, 1977

MEMORANDUM OPINION

The plaintiff in this case, Barbara Kline, worked as a clerk for the defendant Pittsburgh & Lake Erie Railroad Company (P&LE) from May 16, 1969 until March 21, 1972, when she was given a leave of absence because of injuries sustained in an automobile accident. The plaintiff was a member of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (B.R.A.C.) which had negotiated a collective bargaining agreement with the P&LE which was in effect at all relevant times in this lawsuit.

While her leave of absence was still in effect, the P&LE terminated the plaintiff's employment because she allegedly had violated Rule 23 of the collective bargaining agreement:

"It is understood that the application of Rule 23 will not permit the granting of a leave of absence to engage in business or to accept employment in outside service."

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

The plaintiff's alleged violation of this rule involved her acceptance of employment as a waitress in the Global Lounge in Washington, Pennsylvania.

The plaintiff appealed this dismissal through the various steps of the grievance procedure contained in the collective bargaining agreement with the company's position being upheld at each step. However, arbitration procedures before the Third Division of the National Railroad Adjustment Board (NRAB) resulted in a decision in the plaintiff's favor on July 16, 1976, Award No. 21128, Docket No. CL-21275. The NRAB ruled that rule 23 prohibited only the *granting* of leaves of absence to engage in outside employment but did not necessarily prohibit acquiring employment *after* a leave had been granted.

At issue in this lawsuit is whether the plaintiff is entitled to back wages from August 30, 1973 until September 16, 1976, when she returned to work. The defendant has refused to pay the plaintiff these back wages because the NRAB's opinion does not specifically state that they must be paid. The plaintiff on the other hand, claims that an intention to award back wages can convincingly be inferred from the NRAB's opinion. In support of this position the plaintiff points to the NRAB's ruling that the plaintiff be reinstated with "seniority and all other rights unimpaired" and to Rule 20, pursuant to which this dispute reached the NRAB, which authorizes awards of back pay.¹

This court cannot determine with certainty which interpretation of the NRAB's July 16, 1976 opinion is correct. The

¹ Rule 20(c). If the employee is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, if any, and his record cleared.

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

court also notes that the NRAB's order accompanying the opinion is also ambiguous, stating that:

"The Pittsburgh and Lake Erie Railroad Company is hereby ordered to make effective Award Number 21128, made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the award on or before x x x x."

The purpose of crossing out the date is not clear.

This member of the court was faced with an ambiguous order of the United Railroad Workers Division of Transport Workers Union, AFL-CIO System Board of Adjustment (System Board) in the case of Frank A. Sciotto, et al v. George P. Baker, et al, CA 72-1124. Appeal to the Federal Court from System Board Rulings, as well as from NRAB rulings, lies under 45 USC 153 p and q.²

² "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board in the Premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the

(Footnote continued on following page)

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

In the Sciotto case, the System Board had ruled that the plaintiff was entitled to back wages if found to be fit to work during the period of his illegal layoff. The ambiguity arose from the fact that a medical report about Sciotto was wholly

(Footnote continued from preceding page)

district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, that such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction or for fraud or corruption by a member of the division making the order.

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject as provided in sections 1291 and 1254 of Title 28, United States Code."

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

inconclusive as to the ability of Sciotto to perform his duties between March 18, 1969 and March 3, 1972, the date of the medical examination and the System Board award simply does not specify what should happen where the physicians' report does not refer to Sciotto's fitness prior to the time of the examination.

This court felt that it was limited under 45 USC 153 to enforcing or setting aside the order of the System Board and accordingly interpreted the award in what appeared to be the most reasonable manner. (Memorandum and Order denying the defendant's motion for judgment on the pleadings, November 13, 1973, Unpublished). The Third Circuit reversed this court finding that the proper course of action under these circumstances was to remand the case to the System Board to seek clarification of their award:

"In light of the record, we are constrained to conclude that the intended disposition by the System Board in this matter was sufficiently unclear so that the district court award of back wages for the period from March 18, 1969 to March 21, 1972 cannot be sustained.

* * * *

"No enforcement could be ordered by the district court without substantial interpretation regarding the intention of the System Board as to the period in question. Such interpretation is not the function of a federal court under the statute. (Appeal No. 74-1650, 3d cir, unpublished opinion, Per Curiam, March 5, 1975, pp. 4-5).

This case is exactly like Sciotto in that the NRAB ruling is unclear. The court will therefore follow the Third Circuit's

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

mandate in Sciotto and orders this case remanded to the Third Division of the National Railroad Adjustment Board to obtain clarification of its award with regard to whether or not the plaintiff shall receive back wages. This court will retain jurisdiction to enforce or set aside the order under 45 USC 153 after it has been clarified by the NRAB.

s/ WILLIAM W. KNOX,
United States District Judge.

CC: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARBARA KLINE,

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348

ORDER

AND NOW, to wit, July 8, 1977, after consideration of the briefs and arguments of the parties and for the reasons advanced in the accompanying memorandum,

*Appendix "B"—Memorandum Opinion and Order of the
United States District Court.*

IT IS ORDERED that the within case be and the same is hereby remanded to the Third Division of the National Railroad Adjustment Board to obtain clarification of Award Number 21128, Docket Number CL-21275 dated July 16, 1976, with regard to whether the plaintiff is entitled to receive back wages.

IT IS FURTHER ORDERED that the defendant's motion to dismiss be and the same is hereby denied with the court retaining jurisdiction over this case under 45 USC 153 to enforce or set aside the award of the Third Division of the National Railroad Adjustment Board after it has been clarified.

IT IS FURTHER ORDERED that counsel for both parties proceed forthwith to notify the Third Division of the National Railroad Adjustment Board and provide the same with copies of this opinion and order to the end that expeditious treatment may be accorded this matter.

s/ WILLIAM W. KNOX,
United States District Judge.

CC:

Joseph Talarico, Esq.,
200 Lawyers Bldg. 15219.

Edward Yurcon, Esq.,
324 P&LE Terminal 15222.

**Appendix "C"—Interpretation of NRAB's Opinion
Upon Remand**

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Joseph A. Sickles, Referee

Serial No. 293

Award Number 21128

Docket Number CL-21275

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station employees

Pittsburgh and Lake Erie Railroad Company

**ON REMAND FROM THE
UNITED STATES DISTRICT COURT-
WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 77-348**

INTERPRETATION TO AWARD 21128, DOCKET CL-21275

We are called upon to render an interpretation of Award 21128 of this Division, particularly as to whether or not there is an entitlement to receive back wages under that Award.

Initially, we are inclined to remind the parties that the purpose of an Interpretation is to clarify an Award; but it is not a means to provide an avenue to reargue the original claim.

In the Court's Memorandum Opinion which accompanied the Order of Remand, we find:

"The plaintiff on the other hand, claims that an intention to award back wages can convincingly be inferred from the NRAB's opinion."

*Appendix "C"—Interpretation of NRAB's Opinion
Upon Remand*

In that regard the Court noted Rule 20(e):

"If the employe is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, if any, and his record cleared.

Reference to the cited Rule was made in the Employee's original Submission. Carrier did not challenge or rebut that inclusion as being "new argument" or not a matter which had been raised when the matter was under review on the property prior to the original Submission. Significantly, the Board considered - and rejected - the Rule 20(e) argument in view of the circumstances presented in this dispute.

Our "Claim Sustained" Award was merely responsive to the Statement of Claim, and the issuance of a "Blank Order" is a Division practice which does not require a "payment of money."

The employe is not entitled to back wages under Award 21128.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. Paulis
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November 1977.

**Appendix "D"—Memorandum and Order of the
United States District Court**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARBARA KLINE

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348

Dated: February 14, 1978

MEMORANDUM: DEFENDANT'S MOTION TO DISMISS

This controversy arises from an order of the National Railroad Adjustment Board Third Division entered July 16, 1976, award No. 211128, Docket No. CL21275 sustaining plaintiff's claim for restoration of service with seniority and all other rights unimpaired but which were silent with respect to back pay. The order was as follows:

"The Pittsburgh and Lake Erie Railroad Company is hereby ordered to make effective Award Number 21128, made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the award on or before. . ."

Appendix "D"—Memorandum and Order of the
United States District Court.

Plaintiff claiming she was entitled to back pay under Rule 20(c) of the Collective Bargaining Agreement which provides:

"If the employee is found not guilty of the offense with which charged, he shall be reinstated compensated for his net wage loss if any and his record cleared"

brought suit in this court to enforce the award by requiring payment of amount allegedly due for back wages. Plaintiff had already been restored to her job pursuant to the award.

The court finding the award ambiguous remanded the matter to the Third Division of the National Railroad Adjustment Board to obtain clarification as to whether plaintiff was entitled to receive back wages. See order of this court dated July 8, 1977. The Board thereafter issued its interpretation to Award 21128 dated November 18, 1977, in which they said, *inter alia*:

"Rule 20(e) argument in view of the circumstances presented in this dispute.

"Our 'Claim sustained' Award was merely responsive to the Statement of Claim, and the issuance of a 'Blank Order' is a Division practice which does not require a 'payment of money'.

"The employee is not entitled to back wages under Award 21128."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: s/ A. W. Paulis
Executive Secretary

Dated at Chicago, Illinois, this 18th Day of November, 1977."

Appendix "D"—Memorandum and Order of the
United States District Court.

Defendant therefore came back with a motion to dismiss the action which the court will treat as a motion for summary judgment under Rule 56 in view of the fact materials *de hors* the record have been received by the court.

It has been many times emphasized that it is not the business of this court to clarify doubtful or ambiguous awards. Pursuant to procedure followed by the Third Circuit in *Frank A. Sciotto v. George P. Baker, et al*, 72-1124, we held we could not order enforcement without substantial interpretation and remanded for interpretation by the Board. We have now received this interpretation holding that the employee was entitled to reinstatement but not to back wages and that Rule 20(c) relative to payment of back wages had been considered.

In support of its motion, defendant cites *Gunther v. San Diego and Arizona Eastern Railway Co.*, 382 US 257, 15 L Ed 2d, 308, 86 S Ct 368 (1965) wherein it was held that the court had gone beyond its power in rejecting the Board's interpretation of the Collective Labor Contract unless it could be said that the Board's interpretation was wholly baseless and completely without reason. We must remember that the law contemplates that decisions on these matters involving expertise in the railroad industry should be made by the Railroad Board of Adjustment and not by the courts. The Board states in its ruling that it has been Division practice to issue awards in cases sustaining the claim but not requiring the payment of money and we cannot say that the Board is not exercising its peculiar knowledge of the railroad industry in entering such orders.

It being clear that the Board did not intend to award back pay to the plaintiff, we must dismiss the case and enter judgment for the defendant.

s/ WILLIAM W. KNOX

CC: Counsel of record.

U.S. District Judge.

*Appendix "D"—Memorandum and Order of the
United States District Court.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BARBARA KLINE

v.

PITTSBURGH & LAKE ERIE RR. CO.

Civil Action No. 77-348

ORDER

AND NOW, to wit, February 14, 1978, for reasons set forth
in the accompanying memorandum,

IT IS ORDERED that defendant's motion to dismiss filed
December 15, 1977, be and the same hereby is granted.

IT IS FURTHER ORDERED that summary judgment be
entered in favor of the defendant and against the plaintiff.

s/ WILLIAM W. KNOX,
U.S. District Judge.

CC:

Joseph Talarico, Esq.
200 Lawyers Bldg 15219

Edward Yurcon, Esq.
324 P&LE Terminal Bldg 15222

**Appendix "E"—Judgment Order of the Court
of Appeals of November 20, 1978**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1470

BARBARA KLINE,

Appellant,

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.

Appeal From The United States District Court
For The Western District of Pennsylvania

D.C. Civil No. 77-348

Submitted Under Rule 12(6) November 14, 1978
Before ROSENN, GARTH, and HIGGINBOTHAM,
Circuit Judges.

*Appendix "E"—Judgment Order of the Court of
Appeals of November 20, 1978.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant,
it is

ADJUDGED and ORDERED that the judgment of the
district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

s/ MAX ROSENN
Circuit Judge

Attest:

THOMAS F. QUINN, Clerk

Dated: NOV 20 1978